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IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARY ANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* CONTINUING CARE LEADERSHIP COALITION, INC. IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* CONTINUING CARE LEADERSHIP COALITION, INC. IN SUPPORT OF PETITIONERS

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amicus curiae* the Continuing Care Leadership Coalition ("CCLC") in support of the Petition for Writ of Certiorari filed by Petitioner Long Island Care at Home, Ltd. The consent of the parties to the filing of this brief has been received, and has been submitted to the Court.[1]

[1] No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Continuing Care Leadership Coalition (CCLC) represents the interests of more than 100 not-for-profit and public organizations providing long term care services in New York State. Our membership includes forty-three mission-driven home care providers who offer essential health care and other services to tens of thousands of individuals in their homes. The remainder of our membership relies heavily on the existing home care system in order to provide a full range of long term care services to older and disabled individuals in nursing facilities, adult day health care programs, and other community-based services.

Specifically, CCLC supports and promotes high-quality, cost-effective long term care services for citizens of New York on behalf of its long term care provider members. CCLC acts as an advocate for its members with respect to issues pertaining to payment and reimbursement, policy analysis and implementation, regulatory and professional affairs and, in that capacity, is familiar with the circumstances facing its members and the potential impact of this case.

The issue before the Court is of exceptional importance to CCLC and its member organizations, and CCLC is in a unique position to describe the potentially severe negative impact of the decision below—that the third-party employer exemption in 29 C.F.R. § 522.109(a) is unenforceable[2]—on health care providers in New York State.

Indeed, CCLC's members and their affiliates will be severely injured by increased costs for home care services, costs that cannot be absorbed by a financially fragile class of providers that disproportionately relies on government reimbursement. Thus, the outcome of this case is of critical importance to the immediate and future financial viability of

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[2] *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48 (2d Cir. 2006).

CCLC's members and their affiliates and their ability to provide needed services to elderly and disabled residents of New York.

SUMMARY OF ARGUMENT

Since the 1970s New York State has structured home care service delivery upon long-standing regulations promulgated by the Department of Labor, which provided a third party employer exemption from federal minimum wage and overtime pay requirements. Within the past two years, these long-standing regulations were a key factor in the successful labor-management bargaining process. The court below invalidated these long-standing regulations, which has the grave potential to destabilize home care service delivery, to adversely affect other long term care providers that rely heavily on the availability of home care services, and to negatively impact the broader health care system in New York.

Specifically, the decision below works against many recent advancements in care for the disabled, moving backward from the seminal *Olmstead*[3] decision, which requires states to provide services in the least restrictive and most appropriate setting. Additionally, the decision below threatens New York's innovative managed long term care program, which allows frail older people to remain in the community and receive health care services through a capitated financing arrangement.

Furthermore if the decision below stands, it will have a severe negative impact on tens of thousands of older and disabled individuals receiving home care services through CCLC's member provider organizations. The decision will drive home care costs up, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government reimbursement.

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[3] *Olmstead v. L.C.*, 527 U.S. 581 (1999).

Therefore, CCLC respectfully requests that the Court grant Long Island Care at Home's Petition for Writ of Certiorari.

ARGUMENT

INTRODUCTION

In 2005, this Court granted the Petition of Long Island Care at Home and remanded this case to the U.S. Court of Appeals for the Second Circuit below in light of the U.S. Department of Labor's December 1, 2005, Wage and Hour Advisory Memorandum ("DOL Memorandum").[4] In this brief, CCLC describes the problems that have resulted since the lower court's decisions in July 2004 and the problems that are expected as a result of the court's decision in August 2006. Specifically, CCLC updates the Court citing anecdotal evidence from member home health care agency staff who provided CCLC with examples of how the lower court's decision is negatively affecting the health care system.

I. THE INVALIDATION OF THE THIRD PARTY EMPLOYER EXEMPTION SEVERELY UNDERMINE'S NEW YORK'S HEALTH CARE SYSTEM AND THE QUALITY OF CARE TO ITS PATIENTS

The lower court's invalidation of the third party employer exemption has directly increased expenses for financially fragile long term care organizations that operate home health care agencies and is beginning to affect other components of the health care system that rely on home health care services. The resulting disruption in continuity of care is negatively affecting the patients receiving and seeking home health care services.

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[4] Department of Labor, Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005) *available at* www.dol.gov/esa/whd/FOH/AdvisoryMemoranda205.pdf.

A. The Decision Below Is Having a Severe Negative Impact on the Long Term Care System in New York

1. *Impact on the Long Term Care System*

The decision below has resulted in an immediate negative impact on the long term care system and the situation is expected to worsen should the Court fail to intervene. Long term care organizations provide an essential service to patients and families by caring for New York's older and disabled population. The continuing care system consists of various components including but not limited to skilled nursing care, home health care, managed long term care, subacute care, and adult day health care. CCLC's member organizations, in particular, also provide long term care for a variety of specialty populations beyond the frail elderly that include children, people with HIV/AIDS, people with Alzheimer's Disease or dementias, people with traumatic brain injury, people with Huntington's disease, and the visually or hearing impaired.

Long term care providers in New York and throughout the nation rely heavily on governmental payments that typically do not fully cover current operating costs. This contributes significantly to that fact that a substantial proportion of long term care providers are financially at risk.[5] Based upon CCLC's analysis of 2004 audited financial statements for home health care agencies, nearly half (55 or 48%) of 115 certified home health care agencies and more than half (64 or 63%) of 102 long term home health care agencies in New York State are losing money. Additionally, more than half

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[5] Robyn Stone, Long Term Care for the Elderly with Disabilities: Current Policy Emerging Trends, and Implications for the Twenty-first Century, Milbank Memorial Fund, (2000) *available at* http://www.milbank.org/reports/0008stone/. *See also* BDO Seidman, A Report on Shortfalls in Medicaid Funding for Nursing Home Care (Apr. 2005) *available at* http://www.ahca.org/brief/bdo_seidman_study.pdf.

(51%) of New York State's nursing facilities, many of which sponsor home health care programs, are losing money.

As a result of the decision below, CCLC's member home health care agencies ("CCLC's agencies") have experienced increased costs. Although most of CCLC's agencies do not directly employ home health care aides, CCLC's agencies provide skilled services, such as nursing, medical care, and therapy, and contract out to licensed home care services agencies (LHCSAs) for paraprofessional services. Since this lower court's decision, LHCSAs have been forced to decrease the amount of hours worked by home health care aides in order to remain in business. As a result, CCLC agencies have experienced increased costs for the additional nurse supervision needed to oversee a greater number of aides working fewer hours. To maintain a high quality of care for their patients, CCLC agencies have also experienced increased costs for training additional numbers of home health care aides that LHCSAs have employed to meet patient care needs while working fewer individual hours, even though the aides are not direct employees of CCLC agencies.

2. *Impact on Long Term Care Reform*

The decision below will also work to undermine New York's commitment to home care as an essential element of the State's long term care system. Since the 1970s, when New York State made a policy decision to make home care services a core element of our long term care system, New York has maintained a commitment to offering long term care services in the least restrictive setting, which it has done by supporting and encouraging the delivery of care in home and community-based settings. New York's commitment to home care is consistent with the U.S. Supreme Court's decision in *Olmstead*,[6] which found that state and public agencies must

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[6] *Olmstead*, 527 U.S. at 581.

make reasonable accommodations to enable disabled individuals to receive services in the least restrictive setting under Title II of the Americans with Disabilities Act (ADA). The generous mix of home and community-based programs available to older and disabled people in New York has helped over 121,000 older New Yorkers continue to live in the community with the needed supports.[7]

In addition, the decision below and the resulting inevitable increase in costs for home health agencies will damage the progress the State has made in piloting innovative ways to help older and disabled individuals remain in the community[8] and efforts to reform the long term care system for the future.[9] Together with various home and community-based long term care options in New York, including the unique managed long term care program, New York relies on home care to complete its vision for the future of long term care in New York State.[10] Managed long term care programs allow

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[7] Neil P. Benjamin, Assistant Director, Division of Health Facility Planning, New York State Department of Health, Attachment to Memorandum to Members of the Planning Committee and the Codes and Regulations Committee (Jan. 17, 2003) (submitted to consider use of home and community services in the development of a revised methodology to update the nursing home utilization data).

[8] New York State Department of Health, Consumer Guide to Community-Based Long Term Care (Apr. 2006) *available at* http://www.nyhealth.gov/health_care/medicaid/program/longterm/.

[9] New York State Department of Health Office of Medicaid Management, Restructuring Long Term Care in New York State, 21 DOH Medicaid Update 6 (June 2006) *available at* http://www.health.state.ny.us/health_care/medicaid/program/update/2006/jun2006.htm. *See also* Commission on Health Care Facilities in the 21st Century, Long Term Care (July 2005) *available at* http://www.nyhealthcarecommission.org/docs/ltc.pdf.

[10] New York State Department of Health, Managed Long Term Care Final Report (Mar. 2006) *available at* http://www.health.state.ny.us/health_care/managed_care/mltc/pdf/mltc_final_rep.pdf.

more than 15,000 frail older and disabled New Yorkers to remain in the community and receive needed long term care services.[11] In addition, the lower court's decision will disrupt other components of the long term care system that allow individuals to remain in the community and that rely on home health care services, such as adult day health care, long term home health care or "nursing home without walls" program, and senior housing.

3. *Impact on Home Care Wage and Benefit Negotiations*

The decision below has destabilized the labor-management achievements in New York and is negatively affecting the job quality of home health care workers. Long term care providers share an interest in paying home care workers a reasonable wage and benefit package in order to retain talented staff. As home care agencies grapple with a limited supply of talented staff as a result of workforce shortages and the projected demand for long term care workers to care for our aging population, they have made progress toward achieving important wage and benefit increases, reflected in 2004 labor negotiations.[12] However, the lower court's decision has significantly undermined achievements made between labor and management.

CCLC's agencies report that as a result of the lower court's decision, aides who typically worked on long-hour cases, when a patient requires 24-hour care through the night, are now working fewer hours per week for multiple agencies.

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[11] New York State Department of Health, Managed Long Term Care Enrollment by Provider and County (June 2006) *available at* http://www.health.state.ny.us/health_care/managed_care/reports/enrollment/monthly/2006/docs/ en6_06.pdf.

[12] Lisa Colangelo, Aides Strike Ends, N. Y. Daily News (June 10, 2004) at 44., *See also* Steven Greenhouse, Health Care Agency Ends Strike, N. Y. Times (June 19, 2004) at B8.

The continuity of care for the patient is being disrupted and aides had who worked long-hour cases are now less able to develop the strong relationships with patients needed to build a high level of trust and to support optimal quality of care. In sum, CCLC agencies report that the lower court's decision has transformed a reliable profession known for its strong caregiver-patient relationship and created an erratic work week for aides, who are finding it difficult to develop the bonds needed to provide the high quality care for their patients that they once could easily do. Such a decrease in job quality will result in increased turnover for home health aides and will deter people from entering the field.

B. The Decision Below Is Having a Severe Negative Impact on the Continuum of Care in New York

1. *Impact on the Flow of Health Care*

The Court of Appeals' prior decision is beginning to obstruct the flow of health care delivery between hospitals and home health care agencies. Home health care services are an essential part of the continuum of care for patients who receive both long term and acute care services. Hospitals rely on home health agencies to receive patients that can be discharged home, rather than having patients linger in the hospital for longer than necessary. For patients that are seeking long-hour home health care services, CCLC agencies are receiving complaints from hospitals about the hospitals' inability to find placement for patients.

More generally, the decision below, by creating disruptions in the continuity of care provided by home health agencies, impairs the ability of hospitals to discharge patients to more appropriate home and community-based settings in a timely manner, and thus increases the average length of stay and creates a new financial burden on already financially fragile acute care institutions. Based on CCLC's analysis of the most

recently available audited financial statements from hospitals in 2002, CCLC estimates that a one day increase in the length of stay for patients in New York hospitals who are discharged to home health agencies would cost the health care system $96 million. Because of the shared responsibilities involved in Medicaid reimbursement, an additional day will increase costs to hospitals, the State, local governments, the federal government, and the workers' compensation system. In addition to this undesirable economic effect, an increased length of stay will result in less access to hospital beds for patients who need them.

2. *Impact on Home Care Patients*

The lower court's invalidation of the third party employer exemption is limiting the flexibility currently treasured by many thousands of patients receiving home health care and personal care services through the Medicaid program. To comply with the Court of Appeals' prior decision, home health care agencies, unable to afford costs that are not covered by government reimbursements, are being forced to decrease or eliminate overtime hours and increase part-time staff. In essence, the lower court's decision is fracturing the continuity of care for home care patients and severing multi-year relationships between patients and caregivers. The court's decision is also negatively affecting families who directly provide informal care to patients, or who oversee the care of loved ones. Home care is often one of the services that enable family caregivers to maintain their loved ones in the community and to allow family members to receive some respite in order to remain employed, or to replenish their energy to continue caring for their loved one at home. These unintended results, as well as the potential for uncovered shifts, will severely limit access for all individuals needing home care.

This cannot be the result. Now is the time to ameliorate the negative impacts that have arisen since the decision below.

The Supreme Court must give the relevant statutory sections their intended meaning and purpose and ensure that the third party employer exemption in 29 C.F.R. § 552.109(a) be upheld. Otherwise, the Court's decisions would exacerbate the severe and immediate impacts that are already taking a toll on older and disabled individuals receiving companionship services and on the health care system overall in New York State.

CONCLUSION

For all of the aforementioned reasons, CCLC respectfully requests that the Court grant Long Island Care at Home's Petition for Writ of Certiorari.

Respectfully submitted,

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